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5. CHINA IN THE WTO DISPUTE SETTLEMENT SYSTEM: FROM PASSIVE RULE-TAKER TO ACTIVE RULE-MAKER?

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According to the Marrakesh Agreement, the WTO has three main functions: trade negotiation, trade policy review, and settlement of trade disputes. As a new Member, China found that its ability to participate in the first two activities was subject to severe constraints. For trade policy review, the restriction is formalized through the Transitional Review Mechanism in Section 18 of the Accession Protocol, which mandates Chinese commitments to be reviewed once every year for the first eight years, with a final review in the tenth year after accession. One may argue that such a review is different from the normal trade policy review in the WTO, as both the scopes of the review and the bodies conducting them are different. Moreover, in reality, the additional burden made it difficult for China to participate in normal trade policy review activities. During the 15-year long accession negotiations, the existing WTO Members pressed China for far-reaching commitments in each area of the WTO mandate. As a result, China's concessions on both trade in goods and services greatly exceed those of other WTO Members, most of which have not changed since the conclusion of the Uruguay Round. Therefore, when the Doha Round was launched, China could not participate as effectively as other WTO Members as most of its bargaining chips had largely been spent during its accession process. This is why China's negotiating proposals in the Doha Round mostly cover systematic issues rather than substantive market access.

In contrast, WTO dispute settlement is the only area in which no restriction was imposed on China's participation from the very beginning. Because of this, many commentators predicted that the Chinese accession would overburden the WTO dispute settlement system with cases both against and by China. However, China's participation in the dispute settlement system did not turn out exactly as predicted. At least for the first five years, China tried to stay away from formal dispute settlement activities; and only in the second half of the last decade did it emerge as a major player. This note will review China's transformation from a reluctant player into an aggressive litigant in WTO dispute settlement activities, which took place in three stages.

5.1 Rule-Taker

From the time of its accession to early 2006, China took a cautious approach towards WTO litigation. As a newcomer unfamiliar with the WTO legal rules, China put more emphasis on learning WTO rules than on winning specific disputes. In an effort to discourage litigation, China usually settled the dispute quickly with the complainant once a case was filed or threatened, even if it might have had good arguments to defend its actions.[8] For example, in a matter concerning value-added tax rebates on integrated circuits, the US made a request for consultations in March 2004, and the dispute was settled just four months later. The same period also saw China cave in only two months after the EC threatened to bring a formal WTO complaint against China's export quota regime on coke, an essential raw material for the production of steel. The climax of this approach was reached in the Kraft Linerboard case, in which the US complained of inconsistencies with the Anti-dumping (AD) Agreement when the Ministry of Commerce, People's Republic of China (MOFCOM) imposed AD duties on US Kraft Linerboard imports in September 2005. On Friday, 6 January 2006, the US finally threatened to file a formal WTO complaint. On the next working day—i.e., Monday, 9 January 2006—the Chinese government made an announcement to scrap the AD duties in this case.

8 For a review of China's approach towards WTO dispute settlement in this period, see: Gao, H. 2005. 'Aggressive Legalism: The East Asian Experience and Lessons for China', in *China's Participation in the WTO*, Gao, H. and Lewis, D. (eds.). London: Cameron May: Pp. 315-351.

5.2 Rule-Shaker[9]

To build a better understanding of the dispute settlement process, China started to actively participate as a third party in real WTO cases shortly after its accession. From August 2003 to 2006, for example, China joined almost every panel established during the period as a third party. Through its participation as a third party, China gained invaluable understanding of the WTO dispute settlement system and boosted its confidence in participating in the system as a main party. Such enhanced confidence was well illustrated by the remarks of Minister Bo Xilai of MOFCOM in May 2005. When asked whether China would bring complaints in the WTO against the countries that imposed restrictions against Chinese textile exports, Minister Bo Xilai responded:

> First, China has the right to resort to WTO dispute settlement mechanism. We should not hesitate to use this right when needed. Second, while bilateral consultation has its own benefits, if each side sticks to its own view, the problem won't be solved as there is no neutral arbiter. Thus, in addition to one-to-one consultations, sometimes it's more effective to have the disputes reviewed in the multilateral setting. Third, the restrictions against Chinese products are inconsistent with WTO rules and discriminatory. We strongly oppose such measures. Of course, it's up to us to decide whether to take any legal action against such measures and when to do so.

Some of the thinking that informed China's more-aggressive new strategy in WTO litigation is revealed in the following analysis of Mexico's litigation strategy in the *Soft Drinks* case[10] by Dr. Ji Wenhua, an official in charge of dispute settlement activities at China's WTO Mission in Geneva. In the article he published in the July 2006 issue of the *China WTO Tribune* – a monthly journal on trade policy published by MOFCOM and edited by Dr. Zhang Xiangchen – then Director-General of the Treaty and Law Department of MOFCOM, Ji noted that Mexico fought an uphill battle in the case brought against it by the US, but made a good effort defending its case. According to Ji:

> In this case, Mexico's legal position was rather *weak,* but it has made an *unrelenting* effort by raising many arguments which are *tenuous at best* and *fighting a losing battle*.
>
> While we should not publicly *praise* such litigation strategy and attitude, this case still offers us some worthy lessons: under certain circumstances, we should try to employ some strategies, including resorting to *sophistry* and *delay tactics*.
>
> As a respondent, we should try to come up with as many factual and legal arguments as possible. Even if such arguments are mere sophistry, or made for purposes such as creating artificial difficulties for the panel, gaining sympathies, diverting the attention of other parties, or delaying the progress of the case, they are justified so long as they serve to protect our own interests (Emphasis original. Original in Chinese. Translated by the author).

Equipped with this enlightened new attitude toward the WTO dispute settlement mechanism, China has taken a markedly different approach since then. The turning point came in March 2006, when Canada, the EU and the US brought a joint-complaint against China in the Auto Parts case.[11] The complainants accused China of violating WTO obligations by treating some imported automobile parts as whole-car imports and imposing additional charges equivalent to the difference between the higher tariff for whole-car imports and the lower tariff applicable

9 For a review of China's shift in strategy, see: Gao, H. 2007. 'Taming the Dragon: China's Experience in the WTO Dispute Settlement System', *Legal issues of Economic Integration* 34(4): 369–392.

10 Panel Report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, 43.

11 Panel Reports, China – Measures Affecting Imports of Automobile Parts, WT/DS339/R, WT/DS340/R, WT/DS342/R and Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R, WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R.

to automobile parts. Legally speaking, this is a rather simple case as the illegality of the Chinese measure seems to be quite obvious, especially as China has made specific commitments to impose no more than 10 percent tariff on automobile parts imports in its accession package. However, rather than continuing the old practice of settling the dispute privately, China decided not to concede defeat without a good fight. Over the next two and half years, the case would go all the way from the Panel to the Appellate Body until the Appellate Body finally issued its report in December 2008.

The same aggressive approach was taken in several other cases, especially the TRIPS case[12] and the Publications and Audiovisual Products case.[13] In all these cases, China tried to shake or even bend the existing rules by aggressively making legal arguments that put its position in a better light. This strategy was reflected not only in the extensive substantive legal arguments China made, but also in its sophisticated use of procedural objections. As all good lawyers know, while procedural matters may seem mundane, they are of no less importance than substantive claims: if used well, they can even save a hopeless case. Judging from its performance in these cases, China has mastered the 'sophistries' very well. In the TRIPS case, for example, China attacked the complainants on such procedural grounds as the admissibility of certain evidence[14] and the correct scope of the measures at issue.[15] Similarly, in the Publications case, China's procedural arguments included the failure of the US to establish a prima facie case,[16] the evidentiary standards,[17] and the appropriate scope of the Panel's terms of reference.[18]

In its first decade in the WTO, China has successfully made the transition from a Member that was reluctant or even afraid to use the dispute settlement system to one that is increasingly confident and skilful in using it to advance its legitimate interests.

5.3 Rule-Maker

As observed above, while China accepted some rather harsh terms as the price for its WTO accession, it is likely to be difficult for China to change these terms through the multilateral negotiation process. This has left China with only one option: trying to challenge them and soften their negative impacts through creative interpretation in WTO dispute settlement proceedings.

Among the six cases filed by China since September 2008, four (US - Anti-Dumping and Countervailing Duties;[19] EU – Steel Fasteners;[20] US – Tyres;[21] and EU – Footwear[22]) were aimed at changing the rules,

12 Panel Report, China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R, adopted 20 March 2009.

13 Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R.

14 Panel Report, China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R, adopted 20 March 2009. Paras. 6.14-37.

15 Ibid., at paras. 7.1-19.

16 Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R. Paras. 7.458-460.

17 Ibid., at paras.7.620-632.

18 Ibid., at para. 7.63.

19 United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, DS379, Request for Consultations received on 19 September 2008.

20 European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, DS397, Request for Consultations received on 31 July 2009.

21 United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China, DS399, Request for Consultations received on 14 September 2009

22 European Union — Anti-Dumping Measures on Certain Footwear from China, DS405, Request for Consultations received on 4 February 2010

especially the provisions in China's Accession Protocol. For example, in the US — Anti-Dumping and Countervailing Duties case, China challenged the decision by the US authorities to impose both AD and countervailing duties against several products imported from China. In addition to the usual claims under the General Agreement on Tariffs and Trade (GATT), the Anti-dumping Agreement, and the Agreement on Subsidies and Countervailing Measures (SCM), two claims made by China are particularly interesting and are described in more detail below.

The first claim is that the US violated China's Accession Protocol by failing to follow the proper methodology for the determination of the existence and amount of subsidy benefits. Under Section 15(b) of China's Accession Protocol, in subsidy investigations, other WTO Members could "use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks". Similar to subparagraph (a) of the same Section, which allows other WTO Members to use surrogate prices in AD investigations against Chinese firms, this provision was introduced to address the concern that prices in China do not reflect the true cost as China is not yet a full market economy. However, unlike the non-market economy (NME) status in AD investigations, which is scheduled to expire 15 years after China's accession, the alternative benchmark methodology does not have an expiration date. Thus, theoretically speaking, the alternative benchmark methodology could be invoked even 100 years after China's accession to the WTO. As discussed above, it would have been very hard for China to try to change this provision in its accession terms through negotiations in the WTO. Instead, China decided to limit the applicability of the provision by giving teeth to some seemingly innocuous terms in the provision: first, the US failed to make a finding that there were "special difficulties" in applying the prevailing terms and conditions in China as the basis for the determination of the existence of benefits; and second, the US failed to notify the SCM Committee of the methodologies it used. This is a very clever way to try to reduce the utility of the provision. Unfortunately, during the Panel proceeding, China decided to not pursue this claim.[23] However, if the issue arises again and a future Panel indeed chooses to give a strict interpretation of the term "special difficulties", this might greatly reduce the attractiveness of the provision and even effectively render it void.

The second claim is that the US violated the relevant provisions in the Anti-dumping and Safeguards Agreements through its dual application of both AD and countervailing duties against the same products. While the same product may be subject to both AD and SCM investigations, in practice, the US has always avoided the imposition of both AD and countervailing duties for the same products if they are imported from market economies. However, non-market economies do not receive the same treatment and may be subject to both AD and countervailing duties. Under Article VI.5 of the GATT, WTO Members are prohibited from applying both AD and countervailing duties to the same products in the same case. However, the same provision also states that the prohibition of dual application only applies to cases of export subsidies and does not include actionable domestic subsidies, thus inapplicable to the alleged subsidies to Chinese products. However, one may also argue that to the extent that the dual application results in over-compensation, this might result in inconsistencies with the "lesser duty rule" under both the AD and SCM Agreements. In summary, the rules as they currently stand are unclear. Therefore, China hopes to clarify the rules or even make new rules through this case. As the expiration date for non-market economy status in AD investigations draws closer, subsidy investigations will become the main problem facing Chinese firms. Hopefully, through the clarification of these terms in dispute settlement activities, China will be able to change the rules in its favour so that its firms will have an easier time when this issue arises in the future.[24]

23 Panel Report, United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, paras. 10.9-10.12.

24 This was confirmed by the Appellate Body. See Appellate Body Report, United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 25 March 2011, paras. 592-610.

Similarly, both the tyres safeguard case against the US and the two AD cases against the EU involve claims of violation of the individual clauses authorizing the respective trade remedy measures in China's Accession Protocol. While China has only scored mixed success in these cases, they still help to clarify the ambiguous terms used in the Accession Protocol. It is not unlikely that, in future cases, these provisions could be interpreted in a way that would restrict the utility of these provisions in the future. Should this be the case, China would have effectively changed the rules through the WTO dispute settlement process.

5.4 What Lies Ahead?

As can be seen from the discussion above, in its first decade in the WTO, China has successfully made the transition from a Member that was reluctant or even afraid to use the dispute settlement system to one that is increasingly confident and skilful in using it to advance its legitimate interests. Will this trend continue into the future? I think this is highly likely. In a way, this is simply the continuation of established patterns in the WTO: over the history of the GATT/WTO, it is rare to find cases in which the two largest Members, i.e., the US and the EC, are not involved in some capacity. It is only natural that we would find China, the next big trader, receiving the same treatment. While some commentators might lament the extra burden these cases would add to the WTO dispute settlement system, I would argue that they should be viewed in a more positive light: as history has shown us, it is much better for the big players to fight the legal battle within a rule-based multilateral framework than to try to take justice in their own hands by resorting to unilateral measures.